

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HENRY McDougall, } No. CV-06-0272-AAM
Plaintiff, }
v. } **ORDER GRANTING
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT,
*INTER ALIA***
MICHAEL J. ASTRUE, Commissioner }
of Social Security, }
Defendant. }

BEFORE THE COURT are plaintiff's motion for summary judgment (Ct. Rec. 14) and the defendant's motion for summary judgment (Ct. Rec. 17).

JURISDICTION

Henry McDougall, plaintiff, applied for Supplemental Security Income benefits ("SSI") on January 21, 2003. The application was denied initially and on reconsideration. Plaintiff, represented by counsel, then appeared and testified before Administrative Law Judge ("ALJ") James A. Burke on April 26, 2005. William H. Weiss testified as a vocational expert. At the hearing, the ALJ issued a bench decision in favor of the plaintiff, finding him disabled. The Appeals Council conducted a review of this decision based on its own motion and on August 11, 2005, issued an order vacating the ALJ's decision and remanding the case for further proceedings. On December 14, 2005, ALJ Thomas Tielens conducted an administrative hearing at which the plaintiff, represented by counsel, appeared and

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1 testified. Also testifying at the hearing was Jenipher Gaffney, a vocational expert.
 2 On March 2, 2006, ALJ Tielens issued a decision denying benefits. The Appeals
 3 Council denied a request for review and the ALJ's decision became the final decision
 4 of the Commissioner. This decision is appealable to federal district court pursuant
 5 to 42 U.S.C. § 405(g).

7 STATEMENT OF FACTS

8 The facts have been presented in the administrative transcript, the ALJ's
 9 decision, the plaintiff's and defendant's briefs, and will only be summarized here.
 10 At the time of the hearing, plaintiff was 53 years old. He has a 10th grade education.
 11 He does not have any past relevant work experience. Plaintiff alleges disability due
 12 to a variety of physical and mental impairments.

14 STANDARD OF REVIEW

15 "The [Commissioner's] determination that a claimant is not disabled will be
 16 upheld if the findings of fact are supported by substantial evidence, 42 U.S.C.
 17 § 405(g)...." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial
 18 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
 19 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d
 20 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*,
 21 846 F.2d 573, 576 (9th Cir. 1988). "It means such relevant evidence as a reasonable
 22 mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402
 23 U.S. 389, 401, 91 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the
 24 [Commissioner] may reasonably draw from the evidence" will also be upheld. *Beane*
 25 *v. Richardson*, 457 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebreeze*, 348 F.2d 289,
 26 293 (9th Cir. 1965). On review, the court considers the record as a whole, not just the
 27 evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*,

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1 877 F.2d 20, 22 (9th Cir. 1989), quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th
2 Cir. 1980); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

3 It is the role of the trier of fact, not this court to resolve conflicts in evidence.
4 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
5 interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749
6 F.2d 577, 579 (9th Cir. 1984).

7 A decision supported by substantial evidence will still be set aside if the proper
8 legal standards were not applied in weighing the evidence and making the decision.
9 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.
10 1987).

12 ISSUES

13 Plaintiff argues the ALJ erred in finding that plaintiff has no exertional
14 limitations and erred in his finding regarding the plaintiff's mental residual functional
15 capacity (RFC).

17 DISCUSSION

18 SEQUENTIAL EVALUATION PROCESS

19 The Social Security Act defines "disability" as the "inability to engage in any
20 substantial gainful activity by reason of any medically determinable physical or
21 mental impairment which can be expected to result in death or which has lasted or can
22 be expected to last for a continuous period of not less than twelve months." 42
23 U.S.C. § 1382c(a)(3)(A). The Act also provides that a claimant shall be determined
24 to be under a disability only if his impairments are of such severity that the claimant
25 is not only unable to do his previous work but cannot, considering his age, education
26 and work experiences, engage in any other substantial gainful work which exists in
27 the national economy. *Id.*

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1 The Commissioner has established a five-step sequential evaluation process for
2 determining whether a person is disabled. 20 C.F.R. § 416.920; *Bowen v. Yuckert*,
3 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines if he is engaged
4 in substantial gainful activities. If he is, benefits are denied. 20 C.F.R. §
5 416.920(a)(4)(i). If he is not, the decision-maker proceeds to step two, which
6 determines whether the claimant has a medically severe impairment or combination
7 of impairments. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant does not have a severe
8 impairment or combination of impairments, the disability claim is denied. If the
9 impairment is severe, the evaluation proceeds to the third step, which compares the
10 claimant's impairment with a number of listed impairments acknowledged by the
11 Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R.
12 § 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or
13 equals one of the listed impairments, the claimant is conclusively presumed to be
14 disabled. If the impairment is not one conclusively presumed to be disabling, the
15 evaluation proceeds to the fourth step which determines whether the impairment
16 prevents the claimant from performing work he has performed in the past. If the
17 claimant is able to perform his previous work, he is not disabled. 20 C.F.R. §
18 416.920(a)(4)(iv). If the claimant cannot perform this work, the fifth and final step
19 in the process determines whether he is able to perform other work in the national
20 economy in view of his age, education and work experience. 20 C.F.R. §
21 416.920(a)(4)(v).

22 The initial burden of proof rests upon the claimant to establish a *prima facie*
23 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
24 Cir. 1971). The initial burden is met once a claimant establishes that a physical or
25 mental impairment prevents him from engaging in his previous occupation. The
26 burden then shifts to the Commissioner to show (1) that the claimant can perform
27 other substantial gainful activity and (2) that a "significant number of jobs exist in the
28 // /

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1 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,
2 1498 (9th Cir. 1984).

3

4 ALJ'S FINDINGS

5 ALJ Tielens found that plaintiff does not have any "severe" physical
6 impairments which would cause him exertional limitations. The ALJ found that
7 plaintiff does have dysthymic disorder, borderline verbal IQ, an antisocial personality
8 disorder, and a history of alcohol abuse which are "severe." The ALJ found,
9 however, that none of these "severe" impairments, considered separately or in
10 combination, meet or are medically equivalent to any of the impairments listed in 20
11 C.F.R. § 404 Subpt. P, App. 1. The ALJ found that plaintiff has the following
12 residual functional capacity (RFC): no exertional limitations; can perform work
13 involving no fine hearing and only occasional fine fingering; limited to simple
14 repetitive work involving no public interaction and only occasional interaction with
15 co-workers. Based on the testimony of vocational expert Gaffney, the ALJ found that
16 this residual functional capacity does not preclude plaintiff from performing work
17 that exists in significant numbers in the national economy, including hand packager
18 and warehouse jobs. Accordingly, the ALJ concluded that plaintiff is not disabled.
19

20 SEVERITY OF PHYSICAL IMPAIRMENTS

21 A "severe" impairment is one which significantly limits physical or mental
22 ability to do basic work-related activities. 20 C.F.R. §416.920(c). It must result from
23 anatomical, physiological, or psychological abnormalities which can be shown by
24 medically acceptable clinical and laboratory diagnostic techniques. It must be
25 established by medical evidence consisting of signs, symptoms, and laboratory
26 findings, not just the claimant's statement of symptoms. 20 C.F.R. §416.908.

27 Step two is a de minimis inquiry designed to weed out non-meritorious claims
28 at an early stage in the sequential evaluation process. *Bowen*, 482 U.S. at 148. See

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1 also *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996), citing *Bowen*, 482 U.S.
 2 at 153-54 ("[S]tep two inquiry is a de minimis screening device to dispose of
 3 groundless claims"). "[O]nly those claimants with slight abnormalities that do not
 4 significantly limit any basic work activity can be denied benefits" at step two.
 5 *Bowen*, 482 U.S. at 158. "Basic work activities" are the abilities and aptitudes to do
 6 most jobs, including: 1) physical functions such as walking, standing, sitting, lifting,
 7 pushing, pulling, reaching, carrying, or handling; 2) capacities for seeing, hearing,
 8 and speaking; 3) understanding, carrying out, and remembering simple instructions;
 9 4) use of judgment; 5) responding appropriately to supervision, co-workers and usual
 10 work situations; and 6) dealing with changes in a routine work setting. 20 C.F.R.
 11 §416.921(b).

12 ALJ Tielens asked the plaintiff why he was unable to work and he responded
 13 "my back, my shoulder, my neck[,]" as well as difficulties with shortness of breath,
 14 sweating, and vision. (Tr. at p. 9). In November 2000, Susan Powell, M.D., a family
 15 practitioner in Okanogan, Washington, completed a Washington Department of
 16 Social Health Services (DSHS) "Physical Evaluation" on behalf of the plaintiff. She
 17 indicated that plaintiff presented with pain in the upper back, neck and left shoulder.
 18 Plaintiff also complained of left arm weakness and tingling of the 3rd and 5th fingers
 19 on both of his hands. Dr. Powell noted the plaintiff was obese;; that he had a normal
 20 range of motion on his neck with pain on palpation of C6-C7 spinous processes; that
 21 his upper extremity strength was 5/5 bilaterally except for a slightly decreased grip
 22 strength on the left; that he had a decreased range of motion of the left shoulder over
 23 the left AC joint; and that his neck trays showed mild to early moderate degenerative
 24 changes of the lower cervical levels with no bony encroachment on the neural
 25 foramina. Her diagnosis was mild to early moderate C-spine degenerative disease
 26 and left shoulder pain. She rated these as "mild" impairments which did not
 27 significantly interfere with plaintiff's ability to perform basic work-related activities.
 28 (Tr. at p. 306), although she also indicated the plaintiff was limited to "light" work

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1 (lifting 20 pounds maximum and frequently lifting and/or carrying up to 10 pounds;
 2 frequent walking or standing, or sitting most of the time with occasional pushing and
 3 pulling of arm and/or leg controls). (Tr. at p. 307). Dr. Powell completed the DSHS
 4 “Physical Evaluation” form based on her initial assessment of the plaintiff’s
 5 condition.

6 In March of 2002, plaintiff was seen for a DSHS physical by Barbara Bahr, an
 7 ARPN (Registered Nurse Practitioner) with the Mid-Valley Hospital in Omak,
 8 Washington. Based on her first visit with the plaintiff, she diagnosed him with
 9 “neuro-jerking,” alcoholism, mild dementia, right hand numbness, allergies, obesity,
 10 and weak ankles due to a previous fracture. She indicated that all of these conditions
 11 were the result of “years of abuse.” (Tr. at p. 308). It is apparent she was referring
 12 to alcohol abuse. (Tr. at p. 258). It is also apparent that the diagnosis of right hand
 13 numbness was due to plaintiff’s subjective reporting of the same. (Tr. at p. 258).
 14 Nurse Bahr indicated the conditions diagnosed by her were “moderate” to “marked”
 15 in their severity and further indicated that she considered the plaintiff as being limited
 16 to “sedentary” work. (Tr. at pp. 308-09).¹

17 In February 2003, plaintiff was seen at the Mid-Valley Hospital by Jennifer
 18 Brunsdon, M.D., for a DSHS physical. This was plaintiff’s first visit with Dr.
 19 Brunsdon who suggested that plaintiff continue seeing Barbara Bahr, but who
 20 indicated he wanted to see the doctor. According to Dr. Brunsdon, plaintiff was a
 21 “vague historian” who complained of fatigue and shortness of breath, but did not
 22

23 ¹ A “moderate” limitation is one which significantly interferes with ability to
 24 perform one or more basic work-related activities. A “marked” limitation is one
 25 which very significantly interferes with ability to perform one or more basic work-
 26 related activities. (Tr. at p. 308). “Sedentary” work involves lifting 10 pounds
 27 maximum and frequently lifting or carrying articles such as dockets, ledgers, and
 28 small tools. It involves sitting, although a certain amount of standing and walking
 may be involved. (Tr. at p. 309).

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1 complain of any pain. Based on her first visit with the plaintiff, Dr. Brunsdon
 2 diagnosed the plaintiff with possible sleep apnea, depression, and a possible alcohol-
 3 related cognitive impairment. (Tr. at p. 254). Plaintiff did not complain to Dr.
 4 Brunsdon about any orthopedic impairments at this time. In March 2003, the plaintiff
 5 returned to see Dr. Brunsdon, this time complaining about low back pain which had
 6 been present for about a week following his lifting of a heavy object. Dr. Brunsdon
 7 diagnosed the condition as "muscular low back pain." (Tr. at p. 262).

8 In June of 2003, plaintiff saw yet another physician for a DSHS "Physical
 9 Evaluation." Michael D. Bordner, M.D., however, did not diagnose the plaintiff with
 10 any type of physical impairment, other than a fracture of the right fifth metacarpal
 11 which occurred on June 4, 2003. His other diagnoses were depression and post-
 12 traumatic stress disorder. (Tr. at p. 279). According to Dr. Bordner:

13 [Plaintiff] is unable to work due to severe depression
 14 and posttraumatic stress disorder. He really has the
 15 inability to work with other people. He cannot take
 16 orders and this has been a long-standing problem. He
 17 states that he was abused as a child quite severely
 18 by his brothers and sisters who were his primary
 19 caretakers. He is very suspicious of other people and
 20 has a difficult time taking direction from others.

21 (Tr. at p. 279). Dr. Bordner reported there was "no weight loss, night sweats, fevers,
 22 some pain in the right lateral of the fifth metacarpal, [n]o cough, no fever, no
 23 gastrointestinal or genitourinary problems" and that "[a]ll other review of systems are
 24 negative." (Tr. at p. 279).

25 The plaintiff had arthroscopic surgery on his right knee in late 2003. He saw
 26 Edward L. Van Tassel, D.O., for an evaluation in December 2003, three months after
 27 the surgery. According to Dr. Van Tassel:

28 Examination today shows a mild joint effusion of the
 29 right knee. There is no erythema or sign of complications.
 30 The calf is soft and nontender. He has full range of
 31 motion of his knee. Anterior drawer and Lachman's is
 32 minimally positive. Posterior drawer is negative. Collateral
 33 ligaments are intact with no laxity noted. McMurray's
 34 test is negative.

(Tr. at p. 339).

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1 In June 2004, plaintiff was seen by Dr. Brunsdon again. Her chart note reflects
 2 that plaintiff advised he had “been out cutting wood quite a bit lately” and that
 3 “usually he gets in better shape during the summer when he is cutting wood.” (Tr. at
 4 p. 343).² He saw Dr. Brunsdon again in August 2004. He complained of some
 5 shortness of breath. It was noted that he had used Albuterol in the past and that it had
 6 helped, but that he was not using it currently. Furthermore, while the plaintiff did
 7 have a history of sleep apnea, he was not using his CPAP (Continuous Positive
 8 Airway Pressure) because “[h]e is actually going camping and he spends most of the
 9 summer camping out, so he will not be using his CPAP.” (Tr. at p. 343). Also,
 10 approximately in August 2004, plaintiff was seen by Ric Winstead, M.D., for hearing
 11 problems. Dr. Winstead observed that plaintiff was in “no acute distress whatsoever”
 12 and that he was a “slightly poor historian.” Dr. Winstead diagnosed the plaintiff with
 13 chronic right tympanic membrane perforation and hearing loss. (Tr. at p. 341).

14 In February 2005, plaintiff was seen by Charles Adams, M.D., for a refill of
 15 psychiatric medications. According to Dr. Adams:

16 He is alert, cooperative, oriented as to time, place, and person,
 17 and is in no acute distress. The most distressing thing was that
 18 he has now moved from Malot to Okanogan, broken up with
 19 his girlfriend or wife, and no longer has automobile trans-
 portation. He walked to Rite-Aid in Omak yesterday to be
 turned away because he needed doctor okay for refills. The
 patient now faces walking back or switching drug stores.

20 (Tr. at p. 414). With regard to examination of plaintiff’s extremities, Dr. Adams
 21 noted that plaintiff had free range of motion of all extremities and that he walked well
 22 as attested to by his trip to Omak and back on foot. (Tr. at p. 414). At the
 23 administrative hearing, plaintiff acknowledged this was a walk covering three miles.
 24 (Tr. at p. 55).

25
 26 ² June and July 2004 “Progress Notes” from Okanogan Behavioral Health Care
 27 quote the plaintiff as saying he was “out in the woods now cutting firewood.” (Tr.
 28 at pp. 387-389).

1 An ALJ cannot reject a plaintiff's statements about pain and physical
 2 restrictions merely because they are not supported by objective evidence. *Tonapetyan*
 3 *v. Halter*, 242 F.3d 1144, 1147-48 (9th Cir. 2001). "In assessing the claimant's
 4 credibility, the ALJ may use ordinary techniques of credibility evaluation, such as
 5 considering the claimant's reputation for truthfulness and any inconsistent statements
 6 in [his] testimony." *Id.* at 1148. See also *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th
 7 Cir.2002)(following factors may be considered: 1) claimant's reputation for
 8 truthfulness; 2) inconsistencies in the claimant's testimony or between his testimony
 9 and his conduct; 3) claimant's daily living activities; 4) claimant's work record; and
 10 5) testimony from physicians or third parties concerning the nature, severity, and
 11 effect of claimant's condition). An ALJ must offer clear and convincing reasons for
 12 rejecting a claimant's subjective statements about pain and physical restrictions.
 13 *Smolen v. Chater*, 80 F.3d 1273, 1281-82 (9th Cir. 1996).

14 The record reveals varying diagnoses regarding the nature of plaintiff's
 15 physical problems and their severity. Some of the medical providers noted the
 16 plaintiff was a poor historian. The medical providers who indicated that plaintiff's
 17 physical impairments were more than "mild" (Nurse Bahr and Dr. Brunsdon) did so
 18 based on their initial assessment of the plaintiff's physical condition. Furthermore,
 19 it is apparent from the above-cited record that plaintiff was engaging in activities
 20 inconsistent with "severe" physical impairment, such as cutting firewood, camping
 21 and walking three miles. The record also indicates that plaintiff was not compliant
 22 with certain treatment for physical impairments (use of the CPAP). There is also the
 23 matter of plaintiff's work and earning history (Tr. at p. 154), a matter which the ALJ
 24 noted at the hearing ("in the last 15 years you've never earned more than \$3,000;"
 25 "since 1978, I don't think you've earned more than \$10,000 total"). (Tr. at pp. 56-
 26 57). The ALJ offered clear and convincing reasons for finding the plaintiff not
 27 credible with regard to the "severity" of his physical impairments.

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1 Substantial evidence in the record supports the ALJ's finding that plaintiff does
 2 not suffer from any "severe" physical impairment or combination of physical
 3 impairments that are "severe" and which cause him any significant exertional
 4 limitations.³

5

6 MENTAL RESIDUAL FUNCTIONAL CAPACITY

7 What the above-cited record does show is that plaintiff has "severe" mental
 8 impairments, as found by the ALJ, and that alcoholism has contributed to many of the
 9 plaintiff's problems over the years. Starting in January 2003, plaintiff was seen at
 10 Okanogan Behavioral Health Care. The initial diagnosis of plaintiff was "Alcohol
 11 Abuse." (Tr. at p. 244). There is substantial evidence in the record, however, that
 12 plaintiff's mental impairments are not as "severe" as claimed by him.

13 In July 2003, plaintiff was seen by Lance Harris, Ph.D., a psychologist. He
 14 diagnosed the plaintiff with antisocial personality disorder and alcohol abuse in full,
 15 substantial remission. He indicated that plaintiff had "moderate" limitations in his
 16 abilities to understand, remember and follow complex (more than two step)
 17 instructions, to learn new tasks, to relate appropriately to co-workers and supervisors,
 18 and to interact appropriately in public contacts. He indicated that plaintiff had a
 19 "marked" limitation in his ability to exercise judgment and make decisions. He
 20 indicated that all other cognitive and social limitations were "mild" (no significant
 21 interference with basic work-related activities). (Tr. at pp. 282-83). Dr. Harris,
 22 however, also had this to say about the plaintiff:

23 [Claimant] was, as in previous evaluations, evasive, vague,
 24 and appeared manipulative of the kind and extent of information he would provide spontaneously, with very detailed questioning required to learn anything that might cast him

26
 27 ³ Plaintiff's hearing and finger manipulation limitations, while physical
 28 limitations, are non-exertional limitations in that they are not related to strength.
 20 C.F.R. §416.969a(c)(1).

in a negative light or position. When specific questions regarding symptoms were asked, he was inclined to endorse all in a positive (pathological) direction as he has in prior interviews. . . . He was repeatedly queried regarding what kinds of emotional difficulties or problems he might have now. His responses did not indicate the presence of depressed mood, anxiety problems, preoccupation with any events from the past, any form of psychotic symptoms, excessive energy, OC-D [obsessive compulsive disorder], or eating DO [eating disorder]. . . . When asked why he felt he couldn't work now, he said that he couldn't get along with authority, but other than non-specific dissatisfaction with one supervisor giving one instruction for the same task, he was unable to give any examples of how this was a problem. He, instead, focused on the things that allegedly happened to him in the past that made it hard for him to get along with authority, and even when re-directed, still had no examples of problems with authority to offer. When he was queried regarding his work history, he then related a number of physical reasons he couldn't work, saying that he worked for only very brief periods, always in orchards, and always had to quit because he was allergic to the orchard sprays and would start itching. He denied ever having counseling or other psychiatric treatment, but at the end of the interview noted that he was applying for SSI and needed to get money so he could get back on his medications for depression and sleep which he named as Trazodone, Effexor, and Concerta, identifying their purpose. In response to questioning[,] he said he was applying for SSI because he had no work skills, and was not capable of learning new ones because he didn't have his medications. [Claimant] notes full and independent ADL [activities of daily living] functioning including lawn maintenance, pet care, household cleaning, laundry, cooking (at least simple foods), and shopping.⁴

(Tr. at p. 285).

Dr. Harris first saw the plaintiff in November 2001. On that occasion, he diagnosed the plaintiff with panic disorder without agoraphobia and alcohol abuse in full, early remission. At that time, he indicated only "mild" limitations with regard

⁴ An April 2004 "Progress Note" from the Okanogan Behavioral Health Clinic quoted the plaintiff as reporting that he was doing a lot of "fix it" around the house. (Tr. at p. 380). A May 2004 "Progress Note" quoted the plaintiff as "[s]till doing the cooking and doing some projects around the house." (Tr. at p. 383). In a June 2004 "Progress Note," he was quoted as saying that there were "[l]ots of projects to do around the house." (Tr. at p. 386).

1 to plaintiff's abilities to exercise judgment and make decisions, relate appropriately
2 to co-workers and supervisors, and interact appropriately in public contacts. (Tr. at
3 pp. 314-15). Dr. Harris saw the plaintiff again in November 2002. On this occasion,
4 Dr. Harris diagnosed the plaintiff with personality disorder, not otherwise specified
5 and with antisocial features; alcohol dependence in full, early remission; panic
6 disorder without agoraphobia; and adjustment disorder with depressed mood, mild.
7 He indicated the panic disorder without agoraphobia might be caused by alcohol
8 dependence. (Tr. at p. 318). At that time, he indicated a "marked" limitation with
9 regard to ability to exercise judgment and make decisions, and a "marked" limitation
10 with regard to ability to relate appropriately to co-workers and supervisors. (Tr. at
11 p. 319).

12 The record is replete with references to plaintiff's continuing struggles with
13 alcohol dependence. For example, in September 2004, plaintiff was brought to the
14 Okanogan Behavioral Health Clinic where he blew a .232 on the Breathalyzer.
15 Plaintiff reported that he had consumed six quarts of rum, indicating the Breathalyzer
16 reading might continue to climb. (Tr. at p. 394). In 2005, plaintiff moved to the
17 Vancouver, Washington area. In May 2005, plaintiff was seen at Mental Health NW
18 in Vancouver. Plaintiff reported that while he had a long term alcohol problem, he
19 had been sober since November 2004. (Tr. at .p. 426). There is substantial evidence
20 in the record that plaintiff's alcoholism is a substantial contributing factor to his
21 cognitive and social limitations.

22 An ALJ must first conduct the five-step disability inquiry without separating
23 the impact of alcoholism or drug addiction. If the ALJ finds the claimant is not
24 disabled under the five-step inquiry, then the claimant is not entitled to benefits and
25 there is no need to consider the impact of alcoholism or drug addiction. It is only if
26 the ALJ finds the claimant is disabled and there is medical evidence of alcoholism or
27 drug addiction that the ALJ should proceed to determine if the claimant would still
28 be disabled if he stopped using alcohol or drugs. *Bustamante v. Massanari*, 262 F.3d

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1 949, 955 (9th Cir. 2001). Substantial evidence supports the ALJ's determination that
 2 plaintiff is not disabled, even considering his alcoholism.

3 Based on the foregoing, this court concludes that substantial evidence in the
 4 record supports the ALJ's finding as to plaintiff's mental residual functional capacity:
 5 simple repetitive work involving no public interaction and only occasional interaction
 6 with co-workers.

7

8 VOCATIONAL EXPERT HYPOTHETICAL

9 "If a vocational expert's hypothetical does not reflect all of the claimant's
 10 limitations, then the expert's testimony has no evidentiary value to support a finding
 11 that the claimant can perform jobs in the national economy." *Matthews v. Shalala*,
 12 10 F.3d 678, 681 (9th Cir. 1993).

13 The hypothetical which ALJ Tielens presented to vocational expert Gaffney
 14 reflected all of the plaintiff's non-exertional physical and mental limitations found by
 15 the ALJ and supported by substantial evidence in the record. (Tr. at pp. 69 and 70).
 16 Based on that hypothetical, the vocational expert testified there were jobs existing in
 17 significant numbers in the national and regional economies (hand packager and
 18 warehouse worker) which plaintiff was capable of performing. (Tr. at p. 71). The
 19 vocational expert testified these are "unskilled" jobs requiring "medium" exertion.⁵

20

21 ⁵ "Unskilled" work is work which needs little or no judgment to do simple
 22 duties that can be learned on the job in a short period of time. 20 C.F.R.
 23 §416.968(a). Thus, even assuming plaintiff is markedly limited in his ability to
 24 exercise judgment and make decisions as opined by Dr. Harris, that would not
 preclude him from performing "unskilled" work.

25 "Medium" work involves lifting no more than 50 pounds at a time with
 26 frequent lifting and carrying of objects weighing up to 25 pounds. One who can
 27 perform "medium" work can also perform "light" work which involves a good
 28 deal of walking or standing, or sitting most of the time with pushing and pulling of
 arm or leg controls. 20 C.F.R. §416.967(b) and (c).

CONCLUSION

Defendant's motion for summary judgment (Ct. Rec. 17) is **GRANTED** and plaintiff's motion for summary judgment (Ct. Rec. 14) is **DENIED**. The Commissioner's decision denying benefits is **AFFIRMED**.

IT IS SO ORDERED. The District Executive shall enter judgment accordingly and forward copies of the judgment and this order to counsel.

DATED this 17th of April, 2007.

s/ Lonny R. Suko for and on behalf of
ALAN A. McDONALD
Senior United States District Judge